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No. 94-1910

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

ERIN DYKEMA,

Petitioner,

v.

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation,

Respondents,

STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Wisconsin

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. PROCEDURALLY, THIS CASE IS IN PERFECT POSTURE FOR THIS COURT TO RESOLVE THE CONFLICTS CONCERNING THE EXPRESS PREEMPTION ISSUES LEFT UNRESOLVED IN *FREIGHTLINER CORP. V. MYRICK* 2

A. Petitioner Has Neither Abandoned Nor Waived Her Claim Of Jury Misconduct 2

B. The Wisconsin Court Of Appeals Did Not Address Implied Preemption, And Petitioner Has Not Waived Her Right To Contest The Issue 5

II. CONTRARY TO RESPONDENTS' ASSERTION, *CIPOLLONE* DID NOT CHANGE THE LAW CONCERNING EXPRESS PREEMPTION UNDER THE SAFETY ACT 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Boyle v. Chrysler Corp., 177 Wis.2d 207, 501 N.W.2d 865 (Ct.App. 1993), *review denied*, 179 Wis.2d clxxxvii, 510 N.W.2d 137 (1993) 5, 6

Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777 (3rd Cir. 1992) 7

Cipollone v. Liggett Group, Inc., ___ U.S. ___, 112 S.Ct. 2608 (1992) 1, 2, 5, 8

Freightliner Corp. v. Myrick, 514 U.S. ___, 115 S.Ct. 1483 (1995) 9

Hernandez-Gomez v. Leonardo, 180 Ariz. 297, 884 P.2d 183 (1994), *vacated and remanded, Volkswagen of America, Inc. v. Hernandez-Gomez*, ___ U.S. ___, 115 S.Ct. 1819 (1995) 2, 7, 8

Hyundai Motor Co. v. Phillip, 639 So.2d 1064 (Fla.App. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 901 (1995) 2

In Interest of Jamie L., 172 Wis.2d 218, 493 N.W.2d 56 (1992) 3, 4

Myrick v. Freuhauf Corp., 13 F.3d 1516 (11th Cir. 1994), *affirmed on other grounds, Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995) .. 2, 8, 9

Perry v. Mercedes Benz of North America, Inc., 957 F.2d 1257 (5th Cir. 1992) 7

Pokorny v. Ford Motor Co., 902 F.2d 1116 (3rd Cir. 1990), *cert. denied*, 498 U.S. 853 (1990) 7

TABLE OF AUTHORITIES – Continued

Page

State v. Johnson, 153 Wis.2d 121, 449 N.W.2d 845 (1990) 3, 4

Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) 8

OTHER AUTHORITES:

Sec. 809.62(2)(a), Wis. Stats 3

Sec. 809.62(6), Wis. Stats 3

Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, § 23.2 (2d Ed. 1995) 4

Robert L. Stern, *Supreme Court Practice*, § 6.26 (7th Ed. 1993) 4

S.Rep. No. 1301, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. and Admin. News 2709, 2720 10

H.R.Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) 10

ARGUMENT

Respondents erroneously assert that the express preemption issue in this case is purely academic, claiming that petitioner has waived her rights with respect to the jury misconduct and implied preemption issues. No such waiver has occurred, since neither of these issues was addressed by the Court of Appeals of Wisconsin in this case and petitioner did, indeed, address the implied preemption issue in her petition. See Pet. 27-30. A decision by this Court reversing the Wisconsin Court of Appeals' finding of express preemption would affect the outcome of the case, because the case would then be remanded to the Wisconsin court for decisions concerning implied preemption and jury misconduct.

It is understandable respondents have devoted so much of their brief to the above-mentioned procedural arguments, because they have utterly failed to rebut petitioner's showing that there is a clear conflict between the decision of the Wisconsin Court of Appeals with regard to express preemption and every other decision of the federal courts of appeal addressing the issue of express preemption of common law claims for motor vehicle defects under the National Traffic and Motor Vehicle Safety Act ("Safety Act"). Respondents claim that the decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992) will cause all the federal courts who have previously rejected express preemption claims under the Safety Act to reconsider, and apparently reverse, those rulings. Resp. Brief 16-18. However, respondents rely solely on cases involving questions of preemption under dissimilar acts of Congress, cite not a single federal circuit or state supreme court case involving the Safety Act

supporting their contention as to express preemption, and blatantly ignore the decisions in *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 884 P.2d 183 (1994), *vacated and remanded, Volkswagen of America, Inc. v. Hernandez-Gomez*, ___ U.S. ___, 115 S.Ct. 1819 (1995); *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *affirmed on other grounds, Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995); and *Hyundai Motor Co. v. Phillip*, 639 So.2d 1064 (Fla.App. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 901 (1995), all subsequent to *Cipollone*, finding no express preemption of common law claims for defects in motor vehicles under the Safety Act.

Respondents' argument that *Cipollone* mandates a finding of express preemption under the Safety Act shows just how far awry preemption analysis under the Safety Act has gone and verifies the need for this Court to resolve the conflicts.

I. PROCEDURALLY, THIS CASE IS IN PERFECT POSTURE FOR THIS COURT TO RESOLVE THE CONFLICTS CONCERNING THE EXPRESS PREEMPTION ISSUES LEFT UNRESOLVED IN *FREIGHTLINER CORP. V. MYRICK*.

A. Petitioner Has Neither Abandoned Nor Waived Her Claim Of Jury Misconduct.

On appeal to the Wisconsin Court of Appeals, petitioner requested a new trial on the grounds of jury contamination and misconduct. Pet. App. 2-3. Respondents admit that the Wisconsin Court of Appeals never addressed the jury misconduct issue, because of its preemption holding. Resp. Brief 7.

By petitioning the Wisconsin Supreme Court to review the Wisconsin Court of Appeals' decision on the only issue it considered, federal preemption, petitioner has not abandoned or waived her right to have the jury misconduct issue ultimately considered upon remand to the Wisconsin Court of Appeals. Although sec. 809.62(6), Wis. Stats., provides that "petitioner cannot raise or argue issues not set forth in the petition unless ordered otherwise by the [s]upreme [c]ourt," this does not alter the procedure whereby upon reversal of the court of appeals, the supreme court would remand the matter for determination of the jury misconduct issue. Petitioner did not have the right to have the Wisconsin Supreme Court consider the jury misconduct issue, because it was not decided by the court of appeals. Sec. 809.62(2)(a), Wis. Stats., requires that a petition for review to the Wisconsin Supreme Court must contain "[a] statement of the issues presented for review, . . . and how the court of appeals decided the issues." It is ridiculous for respondents to claim that petitioner should have presented the jury misconduct issue to the Wisconsin Supreme Court for review, when the court of appeals never made a decision on the matter.

The two Wisconsin cases cited by respondents in support of their claim of waiver on the jury misconduct issue are distinguishable from this case. In both *In Interest of Jamie L.*, 172 Wis.2d 218, 493 N.W.2d 56 (1992), and *State v. Johnson*, 153 Wis.2d 121, 449 N.W.2d 845 (1990), the court was addressing the duties of a respondent, not a petitioner, to raise issues before the Wisconsin Supreme Court. Different rules apply to petitioners and respondents as to what issues may be raised. *See generally,*

Robert L. Stern, *Supreme Court Practice*, §6.26 at 344 (7th Ed. 1993), a text which was cited favorably by the Wisconsin Supreme Court in *In Interest of Jamie L.*, 172 Wis.2d at 233, 493 N.W.2d at 63.

Moreover, the cases cited by respondents do not support their claim of waiver. In *Johnson*, the supreme court ultimately addressed the issue, 153 Wis.2d at 126, 449 N.W.2d at 847, and in *In Interest of Jamie L.*, the court remanded the matter to the court of appeals for consideration of the issues the court of appeals did not address. 172 Wis.2d at 233, 493 N.W.2d at 63. These cases follow the general rule that the supreme court has discretion to review any substantial issue the case may present, but when the supreme court reverses the court of appeals where the court of appeals has not considered all the issues presented to it, the usual practice is to remand for disposition of the issues not resolved. *See generally*, Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, §23.2 (2d Ed. 1995).

Thus, respondents' claim of waiver with regard to the jury misconduct issue is specious and not supported by any law in the State of Wisconsin. If the Wisconsin Court of Appeals erroneously found express federal preemption, then the case should be remanded to the court of appeals to consider the questions of implied preemption and, if such is rejected, jury misconduct.

B. The Wisconsin Court Of Appeals Did Not Address Implied Preemption, And Petitioner Has Not Waived Her Right To Contest The Issue.

Respondents contend that the decision of the Wisconsin Court of Appeals is based upon a finding of implied preemption and petitioner has waived her right to contest that issue, because she did not address it in her petition. All of these assertions are incorrect.

The Wisconsin Court of Appeals in this case stated that the holding and analysis in its prior decision in *Boyle v. Chrysler Corp.*, 177 Wis.2d 207, 501 N.W.2d 565 (Ct.App. 1993), *review denied*, 179 Wis.2d clxxxvii, 510 N.W.2d 137 (1993), controlled. The *Boyle* decision found express preemption of a claim for absence of airbags, and then went on to state that "[a]s an alternative ground" for its holding, the claim based on lack of passive restraints was also implicitly preempted. Given the finding of express preemption, the *Boyle* court's discussion of implicit preemption was unnecessary to its decision. Moreover, it is inconsistent with the procedure for analysis of federal preemption issues set forth by this Court specifying that if the statute contains a reliable indicium of congressional intent leading to a finding of express preemption, then there is no need for the court to address implied preemption. *Cipollone*, 112 S.Ct. at 2618.

The Wisconsin Court of Appeals in petitioner's case limited its reliance on *Boyle* to the finding of express preemption. After first indicating that the holding in

Boyle controlled, the court of appeals explained this general statement by stating:

> The VWRA system with which VW elected to equip the 1978 Volkswagen Rabbit complies with requirements of FMVSS 208, and therefore "is within the purview of the *explicit* preemption provision prohibiting states from requiring different restraints." [*Boyle*] at 217, 501 N.W.2d at 869.

Pet. App. 8. (emphasis added.)

The above citation to *Boyle* comes from the section of the *Boyle* decision entitled "Explicit Preemption." *Boyle*, at 216-19, 501 N.W.2d at 869-70. The court's conclusion in this case was that "while other standards promulgated under the Safety Act may not evince congressional intent for federal preemption, FMVSS 208 does evince such intent." Pet. App. 7-8, n.4

Thus, the Wisconsin Court of Appeals in this case referred specifically to explicit preemption, and nowhere in its decision does it even mention, let alone discuss, the analysis for implied preemption.

Additionally, it is not accurate to say that petitioner has not addressed implied preemption in her petition. At pages 27-30 of the petition, petitioner presents her views concerning the implied preemption issue. Petitioner points out the differences between this type of case and a case based upon a failure to install airbags or passive restraints, thus distinguishing it from *Boyle*. Petitioner points out that her claim of a lack of adequate restraint which could be cured by adding a lap belt is the same kind of claim which was found not to be preempted,

either expressly or impliedly, in *Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992), and *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3rd Cir. 1990), *cert. denied*, 498 U.S. 853 (1990).

When it comes to implied preemption analysis, the distinction between petitioner's case and those cases involving claims for lack of passive restraints is important. As *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3rd Cir. 1992), noted, the basis for a finding of preemption in a "no-airbag" case is the special expression of congressional intent with regard to protecting an option not to include airbags or other passive restraints in an automobile, thereby preventing states from prematurely making airbags or automatic seatbelts mandatory. *Id.* at 708-81. To the contrary, there is no expression of congressional intent to protect an option not to include another type of restraint, such as a lap belt or something such as the window netting in *Pokorny*.

Even though the Wisconsin Court of Appeals' decision is based solely on express preemption, given the fact that the issue has been raised by both petitioner and respondents before this Court in this case, this Court certainly has the power to take on the issue, if it wishes. Petitioner believes the better approach would be, after a reversal of the Wisconsin Court of Appeals, decision finding express preemption, to remand the matter to the Wisconsin Court of Appeals for determination of the implied preemption issue. This would be akin to what the Court did recently in *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 884 P.2d 183 (1994) *vacated and remanded, Volkswagen of America, Inc. v. Hernandez-Gomez*, ___ U.S. ___, 115 S.Ct. 1819 (1995), where the Court remanded the case

back to the Arizona Supreme Court for a determination of the implied preemption issue.

II. CONTRARY TO RESPONDENTS' ASSERTION, *CIPOLLONE* DID NOT CHANGE THE LAW CONCERNING EXPRESS PREEMPTION UNDER THE SAFETY ACT.

Respondents claim that the conflict between the decision in this case and all of the federal court decisions and most of the state court decisions on the issue of express preemption is based only on cases decided before *Cipollone* and that those courts which rejected express preemption under the Safety Act would reconsider those rulings in light of *Cipollone* and subsequent decisions concerning the Federal Insecticide, Fungicide and Rodenticide Act, the Medical Device Amendments of 1976 to the Federal Food, Drug and Cosmetic Act, and the Federal Boat Safety Act. Resp. Brief 16-18. This is profoundly incorrect, in that subsequent to *Cipollone*, (1) in *Myrick*, the Eleventh Circuit Court of Appeals followed its decision in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), and rejected express preemption under the Safety Act, (2) in *Hernandez-Gomez*, the Arizona Supreme Court also rejected express preemption under the Safety Act, and (3) in *Hyundai Motor Co. v. Phillip*, the Third District Court of Appeals of Florida rejected preemption under the Safety Act.

All of the cases (cited at Resp. Brief 16-18) respondents rely upon for their claim that *Cipollone* has reversed

the expansive body of authority finding no express preemption under the Safety Act involve safety statutes with different provisions from those in the Safety Act. Particularly, none have preemption provisions using the words "safety standard," a pivotal term in the preemption clause of the Safety Act. Additionally, the Safety Act includes a savings clause which has been interpreted to prevent express preemption. The interpretation of the preemption clause and the savings clause in the Safety Act are the issues which were unresolved by this Court in *Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995).

Respondents also claim that the savings clause is only for the purpose of negating the affirmative defense of compliance. However, this is a distinction without a difference. Respondents raised preemption as an affirmative defense. Pet. App. 15-18. Moreover, the court of appeals' decision in this case expressly states that because the VWRA system complied with FMVSS 208, then petitioner's claims are expressly preempted. Pet. App. 8. This amounts to an affirmative defense of compliance with the government standard when even respondents admit that the savings clause negates such an effect.

The legislative history confirms that Congress intended that the savings clause would preserve all common law remedies for injuries arising from defective motor vehicles, notwithstanding the manufacturer's compliance with the safety standards. The Senate Report on that section states that "the Federal, minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person

from product liability at common law." S.Rep. No. 1301, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. and Admin. News 2709, 2720. Similarly, the House Report reads "It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to . . . tort liability." H.R.Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966).

Respondents' argument about the location of the savings clause is also unpersuasive, given the fact that in numerous cases previously cited, courts have found the savings clause to interrelate with the preemption clause in the Safety Act.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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